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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1972

No. 72-324

RUSSELL L. CARTER,

Petitioner,

vs.

UNITED STATES.

PETITION FOR WRIT OF CERTIORARI

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A. OPINION OF COURTS BELOW

The decision in this case was rendered in an Opinion by the Sixth Circuit Court of Appeals on July 29, 1972. A copy of the official report of the Opinion is contained in the Appendix to this petition.

B. STATEMENT OF GROUNDS ON WHICH JURISDICTION OF THIS CASE IS INVOKED

1. The judgment was entered on June 29, 1972, during that date.

2. There was no rehearing, and on July 13, 1972 the time of the petitioner within which to petition for certiorari was extended to August 28, 1972.

3. This court has jurisdiction of this matter under Title 28, U.S.C., Section 1254 (1).

C. QUESTIONS PRESENTED FOR REVIEW

1. In a net worth income tax evasion case, is the requirement that the government's opening net worth must be established with definiteness, accuracy and reasonable certainty a legal prerequisite before submission to the jury, or is it solely a question of fact for the jury?

2. Where the taxpayer claims a substantial cash hoard which claim is corroborated by $17,000.00 cash found in a safety deposit box and cash disbursements during the indictment years of $45,000.00, may the government use solely an estimated cash figure of $1,000.00 throughout its net worth schedules, for which figure its experts can give no justification?

D. STATEMENT OF THE CASE

The indictment charged that the petitioner (hereinafter referred to sometimes as "appellant") attempted to evade payment of income taxes due in 1963, 1964 and 1965 by filing false and fraudulent income tax returns, in violation of 26 U.S.C. Section 7201 (1970). Appellant was sentenced to a total of twelve months in prison with the sentences suspended on payment of a total of $12,000 in fines.

A summary of the government claims in the indictment and in the evidence presented at trial follows:

Taxable Income	1963	1964	1965
Reported	$ 7,527.33	$18,765.49	$ 9,610.33
Actual Taxable Income	32,017.86	33,971.20	51,106.28
Unreported Taxable Income	24,490.55	15,205.71	41,495.95

The government's case was based largely upon a computation of net worth before and after the taxable periods in question. The government claim was that appellant's beginning net worth (at the end of 1962) was $129,491.51 and at the end of the three year period concerned was $214,191.01. (See page 20 of the Appendix attached to this petition for the government's schedule.)

The basic dispute in this case is the government's use in its beginning net worth and during all of the indictment years allowing only $1,000.00 of cash on hand for petitioner who claimed to have $50,000.00 to $60.000.00 in cash in safety deposit boxes, plus approximately $10,000.00 on his person, in his home and in his office safe on the date of the beginning point of the net worth of December 31, 1962.

Cash of Carter

1. Safety Deposit Box.

Carter was first interviewed by one Revenue Agent Richards on July 29, 1966 who asked if Carter had any cash. Carter stated that he had approximately $17,000.00 in a safety deposit box. (App. p. 77) * Richards asked if Carter would object to their inventorying the safety deposit box. Carter consented. Because it was too late in the day on a Friday, this was put over to the following Monday. (App. pp. 78-79) When they inventoried the safety deposit box on August 1, 1966, they found over $17,000.00 in cash. (App. pp. 79-80) Agent Richards acknowledged it was unusual to find this amount of cash in a safety deposit box (App. p. 87)

* References are to Appendix filed in the U.S. Court of Appeals.

2. Carter's Claims on Cash Hoard.

Carter always claimed to have a substantial amount of currency.

Special Agent Reeg of I.R.S. testified that Carter stated at first that the amount of currency he had on hand on December 31, 1960 was approximately $30,000.00 to $32,000.00. Carter allegedly stated that this sum was kept in a safety deposit box except for $700.00 to $1,000.00 which would have been in his home and on his person. (App. pp. 90-91) Carter allegedly stated that on December 31, 1960 he had approximately $20,000.00 and that when he had begun the practice of law in the mid-40's, he had approximately $6,500.00 cash on hand.

Reeg also testified that Carter claimed to have in May, 1962, $42,000.00 of currency as to the best he could recall. (App. pp. 90-91) Reeg testified that Carter stated that the $42,000.00 currency was the most currency he had ever had on hand. (App. pp. 90-91) Reeg testified that in an interview in October, 1966 Carter corrected his assertion on the amount of currency that he had on hand and stated that the $42,000.00 he had on hand was actually the amount of currency as of July 31, 1963. Carter further stated that to this $42,000.00 figure should be added the $7,000.00 to $8,000.00 that he had deposited in savings accounts between January 1, 1963 and July 31, 1963. This meant, according to Carter (as testified to by Reeg), that he had approximately $50,000.00 of cash on hand at the beginning of 1963. (App. p. 92) Thus the largest amount of cash that Carter claimed to have, according to Reeg's testimony, was $50,000.00. (App. pp. 92-93)

Carter testified that at the latter part of 1962 he had approximately $55,000.00 to $60,000.00 in currency in his safety deposit box, plus $8,000.00 or $9,000.00 locked up

in his office and $1,015.00 at home or on his person. (App. pp. 142-143) Carter acknowledged that he had used the $42,000.00 figure to Agent Reeg, but he also stated that he always had told them that he had substantial cash. I.R.S. kept on changing as regards the years that they were checking into, and they would move from year to year in their interrogation. (App. p. 143)

3. Cash Activities of Carter.

During the indictment years of 1963 through 1965, the evidence established cash disbursements by Carter of at least $45,000.00. Practically all of this was based on leads given by Carter. In 1963 the government's evidence showed that Carter had made deposits in the form of cash in savings accounts of $12,800.00. (See App. pp. 188-193.)

Carter purchased a car in 1964 and a substantial amount of the payment on the car, according to Revenue Agent Richards, was cash. (App. pp. 86-87)

Edward D. Moore, a registered representative with W. E. Hutton Company in Dayton, testified that on or about March 31, 1965 (see Defendant's Exhibit D), Carter had acquired 200 shares of Winters National Bank & Trust Company. To acquire such, Carter showed up at the brokerage house with cash to make the purchase. He had in his possession according to Moore $13,487.50 in cash. Mr. Moore told Carter that they could not handle that kind of cash and accompanied Carter to a nearby bank to convert the same into a cashier's check. (App. pp. 124-125)

Joe Mink testified that he was a broker who had sold the house to Carter. He stated that the earnest money was given to Mink in the form of $500.00 in cash on June 16, 1965. (App. p. 127) Carter paid $42,500.00 for the residence. $22,500.00 was in the form of a mortgage from

the Central Building & Loan. (App. 127-128) The remaining $19,500.00, according to Mink, was paid in cash on the closing date on July 29, 1965. Mink testified that there were three or four people there who counted said money. (App. pp. 128-129) I.R.S.'s investigation indicated that at least $11,000.00 in cash had been paid by Carter. (App. pp. 87-88)

Government Justification of the $1,000.00 Cash Figure

The government used a $1,000.00 figure for Carter's cash position in its schedules on December 31, 1962 through 1965. In effect, the government's schedules assumed that there was no change in Carter's cash position during that entire period of time. This was patently inconsistent with Carter showing up with $13,487.50 on March 31, 1965 to purchase securities. It was patently inconsistent when Carter showed up with $18,500.00 when he purchased the house on July 29, 1965. The government used as its expert on the schedule, Special Agent Reeg. On cross-examination Reeg acknowledged that the exact amount of currency on hand as of "January 1, 1965 was not known." He acknowledged that the cash position on December 1, 1965 was very possibly wrong. He acknowledged that the figure for December 31, 1964 could well be wrong. He was then asked the following:

> Q • • • Name me one thing that shows $1,000 of cash in Judge Carter's possession on December 31, 1962?
>
> A *As of that exact date I cannot name any one thing that would.*
>
> Q Wonderful.
>
> Give me one thing that justifies $1,000 for December 31, 1963, one thing?
>
> A It was based on the entire investigation.

Q I am not interested in the entire investigation. In your general estimate *give me one thing that justifies that figure of $1,000?*

A *I cannot give you one thing.* (emphasis added)

Q *Give me two things?*

A *I cannot give you two things.*

Q *Give me three things?*

A *I cannot give you three things.* It was still based on the entire investigation, sir. (emphasis added)

To say that it was based "on the entire investigation" was an improper basis. Included in "the entire investigation" were numerous items of hearsay and inadmissible evidence. Reeg could not name anything in the record to justify his figure of $1,000.00. Despite the accumulation of the above deficiencies in the government's case, the schedules were allowed to go to the jury on all three counts and the jury found the defendant guilty.

E. ARGUMENT

1. The conversion by the Sixth Circuit of the Holland v. United States requisite of a definite and certain opening net worth from a legal prerequisite to solely a question of fact for the jury is in conflict with Holland v. United States and other applicable decisions of this Court and is a departure from the accepted and usual course of judicial proceedings such as to call for an exercise of this Court's power of supervision.

This Court established the requisites in a net worth case before such could be submitted to a jury. In *Holland* v. *United States,* 348 U.S. 121 (1954), among other things *Holland* established at least two requisites as a matter of law.

1. In a net worth case, the government's proof of the opening net worth must be definite, accurate and reason-

ably certain. Thus, it is stated in *Holland* v. *U. S.*, 348 U. S. 121, 132:

> "Establishing a *Definite* Opening Net Worth. We agree with petitioners that an essential condition in cases of this type is the establishment, with reasonable *certainty*, of an opening net worth, to serve as a starting point from which to calculate future increases in the taxpayer's assets. The importance of *accuracy* in this figure is immediately apparent, as the correctness of the result depends entirely upon the inclusion in the sum of all assets on hand at the outset." (Emphasis added)

The requirement of definiteness, certainty and accuracy exists because the net worth concept is "so fraught with danger for the innocent that the courts must closely scrutinize its use." (*Holland, id.*, at page 125.)

2. When a taxpayer provides the government with an explanation as regards the cause for the bulge in visible net worth, the government has the responsibility of negating those leads. As is stated in *Holland*:

> "When the Government rests its case solely on the approximations and circumstantial inferences of a net worth computation, the cogency of its proof depends upon its *effective negation* of reasonable explanation by the taxpayer inconsistent with guilt." (*Holland, id.* 131, emphasis added.)

The government must produce "adequate proof" to "negative all the possible non-taxable sources of the alleged net worth increases." (*Holland, id.* 137) To negate something means to cause "to be invalid or ineffective" (Webster's Seventh New Collegiate Dictionary, p. 565). It is not enough to show that certain things are inconsistent with a cash hoard, as is claimed by the government brief (page 8). A thing can be inconsistent with the proposition of

cash without negating it or invalidating it. The law requires invalidation of, not just inconsistency with, cash hoard.

The basic flaw in the Sixth Circuit's handling of this case is that it has disregarded the *Holland* requisites on net worth. It has converted those requirements from a legal requirement of a *prima facie* case necessary for submission to a jury, into a fact question for decision solely by a jury. The Court of Appeals, after acknowledging the *Holland* requisite that the opening net worth must be reasonably certain, accurate and definite, states (see page 21 of attached appendix):

> "It is clear to us, however, that the Supreme Court in *Holland* contemplated that the basic fact finding on this topic would normally be for the jury. Thus Justice Clark's opinion discussed the net worth method entirely in terms of a jury trial."

The support for this conclusion cited by the Sixth Circuit is the language of *Holland* that the charges to the jury "should be especially clear, including . . . a summary of the nature of the net worth method, the assumptions on which it rests, and the inferences available both for and against the accused." (Page 21 of Circuit Court decision quoting from *Holland* at page 129.) The Sixth Circuit erred. That language established an additional requisite of clarity of instructions to the jury. It did not convert the opening net worth requisites into a jury question. That language appears in *Holland* right after the Supreme Court discussed the many perils of the net worth approach (pages 127 through 129). More conclusively, the language appears in the opinion under another heading, three pages *before Holland* discusses opening net worth! The only other support used by the Sixth Circuit for this conclusion is the language in *Holland* that "a jury is used to weigh the

chances that the evidence correctly points to guilt against the possibility of inaccuracy for ambiguous inferences." (Page 22 citing page 140 of *Holland*.) That language had nothing to do with the legal requisites of a *prima facie* case on net worth. It related solely to whether the definition of proof beyond a reasonable doubt is any different in a circumstantial evidence case, as contrasted with a direct evidence case. (See *Holland*, 139-40.) Thus the Sixth Circuit's sole justification is to quote irrelevant language from *Holland* to support this conversion to a jury question.

The Supreme Court in *Holland* made clear that the requisite of reasonable certainty, definiteness and accuracy of opening net worth, and the investigation of leads, are legal prerequisites before submission to the jury. It first pointed out the enormous dangers in a net worth case for it is "so fraught with danger for the innocent that the courts must closely scrutinize its use." (348 U. S. at 125). Also see 348 U. S. 127 through 129. After stating that this definiteness of opening net worth "was an *essential* condition" and that "the correctness of the result depends *entirely upon the inclusion in this sum of all assets on hand at the outset*" (page 132), the Court then meticulously examined the evidence in *Holland* to determine if the government had negated the cash hoard claim. It concluded that the jury "verdict was fully supported" (348 U. S. at 134), for Holland was nearly destitute. As regards investigation of leads, this Court noted that when the government "fails to show an investigation into the validity of such leads, the trial judge may consider them as true, and the government's case *insufficient to go to the jury.*" This avoids the accused's being "forced by the perils of an adverse verdict to come forward to substantiate leads which he had previously furnished the Government." (348 U. S. at 136) In our case there was investigation of leads of

Carter, but instead of negating cash hoard, many of them corroborated the existence of a cash hoard, *i.e.*, the $45,000.00 worth of cash disbursements, plus cash in the safety deposit box. That these are both questions of law is supported by *Friedberg* v. *U. S.*, 348 U. S. 142, decided at the same time as *Holland*. There the defendant argued that there was insufficient evidence as to his opening net worth, for he claimed $60,000.00 cash which the government disregarded in its schedules. This Court meticulously examined the evidence showing Friedberg's near destitution while he allegedly had the hoard. This Court concluded that it pointed "unmistakenly to the conclusion that petitioner had no such hoard of cash at the starting point." (348 U. S. at 143) If these were merely questions of fact for the jury to determine under proper instructions, then why would this Court scrutinize these facts? Obviously, because initial compliance with *Holland* are legal requisites, and not just jury questions decided under proper instructions.

The Sixth Circuit in this case is inconsistent with another Sixth Circuit case, *Thomas* v. *CIR*, 223 F2d 83 (CA 6, 1955), involving civil tax liability. In an opinion by the then Judge Potter Stewart, that court concluded that a test for an opening net worth in *Holland* applied to a civil case. IRS had based its case as to the amount of cash on hand at the beginning of tax year on an agreement by one of the taxpayers and a State of Ohio tax official. That tax official (Herron) testified that these figures were estimates by him, and he would have changed those estimates if given an opportunity. Judge Potter Stewart labeled those nothing but guesswork, without foundation. Said Judge Stewart (23 F.2d at 90):

> "The figures arrived at during the conference between Herron and the attorney were the sole support for the Commissioner's determinations of cash on hand at the

> beginning of the various years involved. Those figures had the inviting quality of apparent exactitude, and it is understandable why the Commissioner seized upon them. '(B)are figures have a way of acquiring an existence of their own, independent of the evidence which gave rise to them.' *Holland* v. *United States*, 348 U. S., at page 128, 75 S.Ct. at page 131. Yet these figures were in fact merely arbitrary estimates bottomed upon assumptions shown to be entirely without foundation. Since the Commissioner's determinations of cash on hand for the various years were based entirely upon these figures, his determinations must fall, and the cases must be remanded to the Tax Court to determine the amounts of cash on hand which the petitioners had at the beginning of the year 1946 and of the three subsequent years."

Thus the Sixth Circuit, under Judge Potter Stewart's leadership, recognized the *Holland* requisites as being questions of law. In our case, Special Agent Reeg failed to name a single thing to justify the $1,000.00 figure except to say "the entire investigation." That was obviously deficient, because the entire investigation included a lot of material not admitted in the trial against Carter (hearsay, prior state and federal tax returns, and numerous other items). Thus, in effect, the $1,000.00 figure was merely "an arbitrary estimate," *Thomas* v. *CIR, supra.*

This Court must not allow the conversion of the *Holland* requisites into solely a jury question. *Holland* is filled with numerous references to the extreme dangers of the net worth case for the accused. The thrust of *Holland* is that there must be strict adherence to its requisites before submission to a jury to avoid the described perils. The intent of *Holland* is that before the government can disregard a cash hoard claim in its schedules (as was done to Carter in this case), it must negate the existence of a cash hoard by showing near destitution. Further, there

cannot be guesswork as regards any of the assets in the opening net worth. That would subvert the entire concept of presumption of innocence and proof beyond a reasonable doubt. *Holland* specifically stated that it was not the intent of the *Holland* rules to "shift the burden of proof" to the accused (348 U. S. at 138). To allow the Sixth Circuit's holding to stand in this case subverts *Holland*. It is thus a holding in conflict with *Holland* and its companion cases.

2. Where a taxpayer claims a cash hoard, which is corroborated by other evidence, and the government failed to negate the existence of that cash hoard, the Fifth and Sixth Circuit Courts of Appeal are now in conflict as to whether the government has a prima facie case for submission to a jury in a net worth income tax evasion case.

As shown above, Carter claimed a cash hoard. This was corroborated by $17,000.00 of cash in a safety deposit box and $45,000.00 of cash disbursements during the indictment years. Further, the IRS expert witness admitted he had no justification for the cash figure used, and that it was very possible that he was wrong. Despite this, the Sixth Circuit held that the question could be submitted to the jury of whether this was compliance with the *Holland* requisites of definiteness of opening net worth and investigation of leads. This is in conflict with holdings of the Fifth Circuit.

In *Bryan* v. *United States*, 175 F.2d 223 (CA 5, 1949), the government's case established that Bryan's expenditures exceeded his gross income by $100,000.00. Bryan did not take the stand, but his wife did. She testified that when she married the defendant he was a bootlegger and possessed approximately $180,000.00 in a safe in their closet in their home until November, 1940. Then he allegedly

rented a safety deposit box at the bank in which he placed approximately $150,000.00 to $160,000.00 in cash. She further testified that she made one large expenditure of $40,000.00 by taking that much cash from the safety deposit box, and that she would withdraw money from time to time from the safety deposit box. The jury did not believe the wife's testimony. The auditor acknowledged that all they had on their schedules was "the money we could account for," and acknowledged that he did not know whether Bryan had lots of other money. (175 F.2d at 226) Said the Fifth Circuit in reversing (175 Fed. at 226-7):

> "These admissions are serious in this case because the Government must rely almost entirely upon circumstantial evidence, that is to say, upon the circumstance of the expenditure of considerably more money in the years in question than the Defendant took in from the operation of his night clubs and gambling enterprises. The evidence, being circumstantial, must exclude every reasonable hypothesis other than the guilt of the Defendant. The jury no doubt disbelieved, and had the right to disbelieve, Mrs. Bryan's testimony, but in view of the auditor's admissions that he was not able to say that his computation included all of the assets of the Defendant at the beginning of the period, together with the absence of any admissions, records, financial statements, bookkeeping entries, or other findings, or evidence, tending to bind the Defendant as to the lack of additional assets at the beginning of the tax period, the evidence, in the light of the bill of particulars, was insufficient to make out a prima facie case against the Defendant on the net worth-expenditure basis, and the case should not have been submitted to the jury since it did not exclude the hypothesis that the funds used in making some of the expenditures might have been from sources other than current business income."

The *Bryan* case is like our case. The record does not

establish that the defendant lacked "additional assets at the beginning of the tax period." The government's proof was "insufficient to make out a *prima facie* case against the the defendant on the net worth – expenditure basis, and the case should not have been submitted to the jury." Our case is stronger than Bryan. In our case Carter claimed substantial cash. The evidence shows ample corroboration of his dealing in enormous amounts of cash. In our case the special agent who did the computations acknowledged that there could be error as regards the cash figures he had for the beginnings of 1964, 1965 and the end of 1965. He could not cite a single thing to justify the $1,000.00 cash figure that was utilized in the I.R.S. schedules except to say it was based upon "the entire investigation." That is another way of stating he was guessing.

In *Dupree* v. *U.S.*, 218 F.2d 781, (CA 5 1955), the defendant claimed an accumulation of cash ranging between $65,000.00 to $80,000.00, which originally he estimated at $70,000.00. He also claimed that his wife, who had worked for some 25 years, had cash accumulations just as well. I.R.S. in its schedules gave him no credit at all for a penny of the $65,000.00 to $80,000.00 of cash that he had claimed or for any savings of his wife, (218 F.2d at 786). The Fifth Circuit noted that the only justification which the government had for ignoring this contention was its conclusion that they considered Dupree's claim incredible. The Court of Appeals noted that there was some substantiation of Dupree's claim. He had worked hard and lived frugally for many years. (There is evidence to that effect for Carter just as well.) He had owned and operated a moving picture theatre. His wife was a beauty shop operator. They owned a home and had acquired an equity of some $11,000.00 in real estate. There were also substantial charitable contributions made by the defendant and he had shown cash to his accountant. None

of this corroboration was any stronger than the ample corroboration of the cash activities of Carter in our case. Concluded the Fifth Circuit (218 F.2d at 788):

> "Here we find that the Government's proof in support of its excess of expenditures theory lacked the essentials of adequate proof of opening available funds at the beginning of the entire period and lacked it at the beginning of any one of the prosecution years. *Bryan* v. *United States,* 5 Cir., 175 F.2d 223."

The rule of law of the *Dupree* case is quite clear. I.R.S. must give credit to an accused for the amount of cash hoard he claims unless it can establish that it did not exist. As the Fifth Circuit stated (218 F.2d at 787), the kind of evidence necessary to refute a claim of cash is shown in *Holland* v. *United States, supra.*

Both of these cases are patently inconsistent with the Sixth Circuit's position. Those cases require the government's schedules to give credit to the accused for the amount of his claimed cash hoard, unless the existence of the hoard is negated by the government's evidence. The Fifth Circuit held that as a matter of law this must be done, and that they are not solely jury questions. This is a direct conflict with the Sixth Circuit's position.

The Seventh Circuit also has authority indicating that it follows the approach of the Fifth Circuit. (*U. S.* v. *Fenwick,* 177 F.2d 488 (CA 7, 1949)) There, IRS had failed to make inquiry as to whether the defendant had cash on hand, and the Seventh Circuit reversed, citing *Bryan* v. *U. S., supra,* and stated 177 F.2d at 492:

> "Remembering that the government has the burden of proof in a criminal case, that the burden never shifts to defendant, that circumstantial evidence must be of such character as to exclude every reasonable hypothesis except that of guilt, it necessarily follows that, when the government relies upon circumstances of increased

net worth and expenditures in excess of reported income to establish income tax evasion, the basic net worth must be established. The defendant is not compelled to take the witness stand; he is not compelled to make proof that he is innocent, but he must be proved guilty by the evidence beyond all reasonable doubt, and where there is uncertainty as to whether all the assets of defendant are included in the government's computation of net worth, it follows that its computations can not be relied on. *Essential proof of no other assets is the cornerstone of the evidence of the government; that cornerstone being faulty, the whole edifice is so weakened as to be undependable as proof of guilt beyond all reasonable doubt.*" (emphasis added)

The conflict between Fifth and Sixth Circuits is clear and direct. It must be resolved by this Court to avoid a disparity of treatment, caused solely by the geographical location of an income tax evasion case. Such a disprate treatment is the very essence of injustice, and the reason why this Court takes in cases involving conflicts between the Circuits.

CONCLUSION

Based on the foregoing, this Court should grant the Petition for Certiorari.

Respectfully submitted,

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APPENDIX

No. 71-1793

UNITED STATES COURT OF APPEALS
For The Sixth Circuit

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. RUSSELL L. CARTER, *Defendant-Appellant.*	APPEAL from the United States District Court for the Southern District of Ohio, Western Division.

Decided and Filed June 29, 1972.

Before: WEICK and EDWARDS, Circuit Judges, and CECIL, Senior Circuit Judge.

EDWARDS, Circuit Judge. Appellant, a former municipal

judge and Ohio budget director, and now a practicing lawyer in Dayton, appeals from a jury conviction in the United States District Court for the Southern District of Ohio, Western Division, on three counts of income tax evasion. The indictment had charged that appellant wilfully attempted to evade payment of income taxes due in 1963, 1964 and 1965 by filing false and fraudulent income tax returns, in violation of 26 U.S.C. § 7201 (1970). Appellant was sentenced to a total of twelve months in prison, with the sentences suspended on payment of a total of $12,000 in fines.

A summary of the government's claims in the indictment and in the evidence presented at trial follows:

	1963	1964	1965
Taxable Income Reported	$ 7,527.33	$18,765.49	$ 9,610.33
Actual Taxable Income	32,017.86	33,971.20	51,106.28
Unreported Taxable Income	24,490.55	15,205.71	41,495.95

The government's case was based largely upon the following computation of net worth before and after the taxable periods in question. The government claim was that appellant's beginning net worth (at the end of 1962) was $129,491.51 and at the end of the three year period concerned was $214,194.01.

Government Exhibit No. 9

RUSSELL L. CARTER

Computation of Unreported Taxable Income Based On Net Worth and Personal Living Expenses

ASSETS	12-31 1962	12-31 1963	12-31 1964	12-31 1965
Cash on Hand	$ 1,000.00	$ 1,000.00	$ 1,000.00	$ 1,000.00
Cash in Banks				
Checking Accounts	2,556.79	167.56	356.06	264.57
Savings Accounts	90,897.58	121,770.04	122,001.00	131,601.17
Bonds — Series E	15,000.00	15,000.00	30,000.00	30,000.00
Stocks and Notes Receivable	2,983.72	1,983.72	983.72	13,487.50
Real Estate	9,386.92	9,386.92	9,386.92	51,886.92
Business Equipment	5,700.00	5,700.00	5,700.00	5,700.00
Automobiles	9,428.49	4,950.00	6,854.70	8,554.70
TOTAL ASSETS	$136,953.50	$159,958.24	$176,282.40	$242,494.86
LIABILITIES				
Mortgages and Loans Payable	$ 402.88	$ 49.93	$ -0-	$ 22,260.00
Allowances for Depreciation	7,059.11	5,105.90	4,089.00	6,040.85
TOTAL LIABILITIES	$ 7,461.99	$ 5,155.83	$ 4,089.00	$ 28,300.85
NET WORTH	$129,491.51	$154,802.41	$172,193.40	$214,194.01
Beginning Net Worth		(129,491.51)	(154,802.41)	(172,193.40)
Increase in Net Worth		$ 25,310.90	$ 17,390.99	$ 42,000.61
Personal Living Expenses		12,646.61	22,303.34	16,283.63
Adjustments to Net Worth		(1,144.97)	(861.14)	(1,039.21)
Adjusted Gross Income		$ 36,182.54	$ 38,833.19	$ 57,245.03
Deductions		(2,394.66)	(2,461.99)	(3,738.75)
Exemptions		(2,400.00)	(2,400.00)	(2,400.00)
Taxable Income Corrected		$ 32,017.88	$ 33,971.20	$ 51,106.28
Taxable Income Reported		(7,527.33)	(18,765.49)	(9,610.33)
Unreported Taxable Income		$ 24,490.55	$ 15,205.71	$ 41,495.95

The basic dispute in this case at trial and on appeal concerns the fact that the government's beginning net worth figure allowed only $1,000 for cash on hand, whereas appellant asserts that he had $50,000-$60,000 in cash in a safety deposit box on December 31, 1962, plus approximately $10,000 on his person or in his office safe.

Appellant claims that government proofs as to the cash

item in the beginning net worth should not have gone to the jury, because as a matter of law they were not sufficient to establish the $1,000 figure employed by a "reasonable certainty." In this regard appellant relies primarily upon *Holland* v. *United States*, 348 U.S. 121 (1954), and *Thomas* v. *Commissioner*, 223 F.2d 83 (6th Cir. 1955).

The *Holland* case does establish "reasonable certainty" as the criterion for judging the validity of the government's opening net worth figure.

> We agree with petitioners that an essential condition in cases of this type is the establishment, with reasonable certainty, of an opening net worth, to serve as a starting point from which to calculate future increases in the taxpayer's assets. The importance of accuracy in this figure is immediately apparent, as the correctness of the result depends entirely upon the inclusion in this sum of all assets on hand at the outset. *Holland* v. *United States, supra* at 132.

It is clear to us, however, that the Supreme Court in *Holland* contemplated that the basic fact finding on this topic would normally be for the jury. Thus Justice Clark's opinion discussed the net worth method primarily in terms of a jury trial:

> While we cannot say that these pitfalls inherent in the net worth method foreclose its use, they do require the exercise of great care and restraint. The complexity of the problem is such that it cannot be met merely by the application of general rules. Cf. *Universal Camera Corp.* v. *Labor Board*, 340 U.S. 474, 489. Trial courts should approach these cases in the full realization that the taxpayer may be ensnared in a system which, though difficult for the prosecution to utilize, is equally hard for the defendant to refute. *Charges should be especially clear, incuding, in addition to the formal instructions, a summary of the nature of the net worth method, the assumptions on*

> *which it rests, and the inferences available both for and against the accused.* Appellate courts should review the cases, bearing constantly in mind the difficulties that arise when circumstantial evidence as to guilt is the chief weapon of a method that is itself only an approximation. *Holland* v. *United States, supra,* at 129. (Emphasis added.)
>
> Circumstantial evidence in this respect is intrinsically no different from testimonial evidence. Admittedly, circumstantial evidence may in some cases point to a wholly incorrect result. Yet this is equally true of testimonial evidence. In both instances, a jury is asked to weigh the chances that the evidence correctly points to guilt against the possibility of inaccuracy or ambiguous inference. In both, the jury must use its experience with people and events in weighing the probabilities. If the jury is convinced beyond a reasonable doubt, we can require no more. *Id.* at 140.

A review of the District Judge's charge to the jury convinces us that he followed the principles of *Holland* with both care and understanding. No objection was made to the critical portions of the charge, nor is any appellate issue presented as to them.

While no doubt there are other deficiencies which may be conveived which could appropriately be viewed by a District Judge as requiring dismissal of a prosecution for failure to establish a case for jury consideration, in *Holland,* the court's emphasis in this regard was on the responsibility of the government to investigate leads:

> While sound administration of the criminal law requires that the net worth approach — a powerful method of proving otherwise undetectable offenses — should not be denied the Government, its failure to investigate leads furnished by the taxpayer might result in serious injustice. It is, of course, not for us to prescribe investigative procedures, but it is within the

province of the courts to pass upon the sufficiency of the evidence to convict. When the Government rests its case solely on the approximations and circumstantial inferences of a net worth computation, the cogency of its proof depends upon its effective negation of reasonable explanations by the taxpayer inconsistent with guilt. Such refutation might fail when the Government does not track down relevant leads furnished by the taxpayer — leads reasonably susceptible of being checked, which, if true, would establish the taxpayer's innocence. *When the Government fails to show an investigation into the validity of such leads, the trial judge may consider them as true and the Government's case insufficient to go to the jury.* This should aid in forestalling unjust prosecutions, and have the practical advantage of eliminating the dilemma, especially serious in this type of case, of the accused's being forced by the risk of an adverse verdict to come forward to substantiate leads which he had previously furnished the Government. It is a procedure entirely consistent with the position long espoused by the Government, that its duty is not to convict but to see that justice is done. *Holland* v. *United States, supra* at 135-36. (Emphasis added.) (Footnote omitted.)

In the *Thomas* case (*Thomas* v. *Commissioner,* 223 F. 2d 83 (6th Cir. 1955)), Judge Potter Stewart[1] applied the principles of *Holland* to a civil action for refund of taxes paid under a redetermination of tax by the Commissioner. There, however, in contrast to the instant case, the Commissioner had found a cash hoard in a safety deposit box on the death of one taxpayer and the question related to when it had been accumulated. In our instant case the principal question of fact pertained to whether or not there was a cash hoard. Appellant did not supply much in the way of specific leads for the government to investigate.

[1] Now Associate Justice of the United States Supreme Court.

Appellant's testimony attributed his net worth to legal fees and modest living expenses. Appellant's own estimates of the cash hoard varied from $32,000 to nearly $70,000. He explained his keeping this amount of cash by saying that he "liked to have currency on hand," that he was a Negro and had difficulty in getting credit, and that since the depression he had not trusted banks.

It is undisputed, however, that during all three taxable years appellant had bank savings accounts of $90,000 to $131,000. And the government proofs repeatedly demonstrated both before and after December 31, 1962, that appellant had credit available to him.

Appellant kept a Cash Receipts book and an Income and Expense book. From these he made up his income tax returns as far as gross income was concerned for the tax years at issue. He likewise kept similar records for the years 1947 to 1963, but destroyed them after this investigation began.

As to the years 1963, 1964 and 1965, the government proved that appellant received substantial income in fees paid to him which were never entered on the Cash Receipts book or the Income and Expense book for the years concerned.

Appellant's testimony indicated that between 1956 and the end of 1962 he deposited over $90,000 in savings accounts and that between 1949 and the end of 1962 he increased his cash hoard from $6,500 to approximately $70,000.

From 1949 to 1953 appellant was employed as an Assistant County Prosecutor at $4,000 to $6,000 a year, with some outside practice. From 1953 to 1959 he was in private practice, except for six months in 1953, as a municipal judge at $3,255 for that period. During these years he claimed added income from legal fees but did not furnish specifics.

Government exhibits of appellant's income tax returns showed a gross income on such returns of $16,313.94 for 1959, $21,268.11 for 1960, $19,338.26 for 1961, and $13,945.33 for 1962.

Additionally, there was strong circumstantial evidence from which the jury could properly have inferred that appellant did not have the large sum of cash in a safety deposit box in 1962 as he claimed, and several instances where the jury could have found important portions of appellant's own testimony to be incredible. All in all, we conclude that there was ample evidence to support the District Judge's denial of appellant's motion for a directed verdict.

On appeal we must, of course, give the government proofs the favorable view which the jury gave them. *Glasser* v. *United States,* 315 U.S. 60, 80 (1942). Viewed in this light, the evidence supports the jury verdict of guilty beyond a reasonable doubt.

Appellant's other stated issues require less discussion. This court has held that noncustodial questioning by Internal Revenue Service agents is not subject to the warning requirements of *Miranda* v. *Arizona,* 384 U.S. 436 (1966). *United States* v. *Stribling,* 437 F.2d 765 (6th Cir.), *cert. denied,* 402 U.S. 973 (1971). Appellant was not in custody during any interview; and we perceive no facts here presented which tend to discredit the District Judge's decision to deny appellant's motion to suppress. There was ample testimony that appellant's conduct was voluntary. *See United States* v. *Goosbey,* 419 F.2d 818 (6th Cir. 1970). *Cf. Bustamonte* v. *Schneckloth,* 448 F.2d 699 (9th Cir. 1971), *cert. granted,* 405 U.S. 953 (1972). In addition to these dispositive facts, appellant was a trained lawyer with some judicial experience.

The Supreme Court has recently held that the Sixth Amendment "speedy trial" requirement applies only after

a defendant is an "accused." *United States* v. *Marion*, 404 U.S. 307 (1971).

Appellant's other issues point out no reversible error.

The judgment of the District Court is affirmed.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 71-1793

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

RUSSELL L. CARTER,
Defendant-Appellant.

BEFORE: WEICK and EDWARDS, Circuit Judges and CECIL, Senior Circuit Judge.

JUDGMENT

(Filed June 29, 1972)

APPEAL from the United States District Court for the Southern District of Ohio

THIS CAUSE came on to be heard on the record from the United States District Court for the Southern District of Ohio and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

No costs awarded. Rule 39 (b).

Entered by order of the Court.

/s/ JAMES A. HIGGINS
Clerk

SUPREME COURT OF THE UNITED STATES

No. A-66

RUSSELL L. CARTER,

Petitioner,

v.

UNITED STATES.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including August 28, 1972.

/s/ BYRON R. WHITE
Associate Justice of the Supreme Court of the United States

Dated this 13th day of July, 1972

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-324

RUSSELL L. CARTER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Southern District of Ohio, petitioner was convicted of having willfully attempted to evade his income taxes for the years 1963, 1964, and 1965, in violation of 26 U.S.C. 7201. He was sentenced to imprisonment for a term of twelve months, with sentence to be suspended upon payment of $12,000 in fines. The court of appeals affirmed (Pet. App. 18-27).

1. In proving tax evasion, the government used the "net worth" method. As the court below noted, however, this approach was strongly corroborated by other direct evidence. Thus, the government's proof at trial included a showing of 33 specific items of omitted income during the three prosecution years: 10 items in 1963, totalling $2,793.83; 13 items in 1964, totalling $2,982.81; and 10 items in 1965, totalling $2,596.47 (App. 199-207).[1]

The proof of petitioner's net worth and expenditures established that petitioner's total unreported taxable income for the prosecution years exceeded $80,000 (Gov't. Ex. 9; Pet. App. 20). Petitioner stipulated at trial that the government's computations, which included savings accounts in excess of $90,000, were accurate except for the omission of a large cash hoard petitioner claimed he had held in safety deposit boxes and in an office safe at the outset of the years in question (Tr. 87-112; App. 199-207).

In determining petitioner's net worth as of December 31, 1962 (*i.e.*, immediately prior to the prosecution years), the government had used a figure of $1,000 for "cash on hand"; this estimate was based on petitioner's own statement concerning the amount of cash he ordinarily kept on hand (Tr. 188; App. 96). However, shortly before trial petitioner claimed that he had possessed a cash hoard of $42,000 at the end of 1962 (App. 90-91). After seeing the government's

[1] "App." refers to the separately bound appendix in the court of appeals. "Tr." refers to the court reporter's transcript of testimony at trial.

determination of his total unreported taxable income, petitioner claimed at trial that his cash hoard had in fact been $70,000 (Tr. 382). However, petitioner did not account for the source of these alleged funds; revenue agents followed leads suggested by petitioner, but they were unable to verify the existence of any cash hoard as of December 31, 1962 (App. 93).

Despite petitioner's assertions, the government's evidence did negate any real possibility that the increase in his apparent net worth from 1963 through 1965 was the result of dipping into a previously amassed cash hoard, rather than the result of unreported income during those years. First, the government established at trial that petitioner's financial history made it highly unlikely that he could have accumulated large amounts of hidden monies in addition to his substantial savings accounts, prior to the prosecution years. Petitioner completed his education in 1947, when he graduated from law school; during the years 1949-1953 he was employed as an assistant county prosecutor, at an annual salary of between $4,000 and $6,000 (Tr. 333; App. 137, 156). He was engaged in the private practice of law from 1953 until 1959 (Tr. 294); he destroyed his books and records for those years (and for all other years prior to the prosecution years) after the beginning of the investigation leading to his indictment (App. 73-82). In 1959 he was appointed Budget Director for the State of Ohio, a position he held until 1962 (App. 123). Second, petitioner's prior reports of his income did not suggest that he was able to salt away a cash hoard in addi-

tion to the nearly $100,000 in cash and securities the government's schedule gave him credit for having at the beginning of the prosecution years. His returns showed adjusted gross incomes of approximately $16,300 in 1959, $21,250 in 1960, $19,350 in 1961, and $14,000 in 1962 (App. 195). And although petitioner testified at trial, he made no attempt to introduce evidence of prior earnings in order to support his claim that he possessed a substantial cash hoard (Tr. 532, 535; App. 155, 159).

Third, there was also evidence that petitioner had borrowed relatively small amounts of cash from lending agencies in the years immediately preceding the years in question (Tr. 424-425; App. 203), and that in October 1962 he had withdrawn funds from his savings accounts and deposited them in checking accounts (Tr. 211-212). These transactions were certainly inconsistent with maintenance of large amounts of pre-1963 cash in safety deposit boxes. Fourth, certain purchases petitioner had claimed were made out of the alleged cash hoard were shown in fact to have been made with funds withdrawn from his savings accounts and with a check drawn on a client's account (App. 194; Gov't. Ex. 79), and, contrary to petitioner's claim at trial, deposits to his savings accounts could not have been made directly from funds allegedly stashed in his safety deposit box (Gov't. Ex. 75).

2. Petitioner contends (Pet. 7-17) that there was insufficient evidence to go to the jury on the question of his net worth, arguing that the decision below re-

jecting this claim is in conflict with this Court's decision in *Holland* v. *United States*, 348 U.S. 121, and with decisions of the Fifth Circuit. However, this case presents no such conflict and warrants no further review, since what is really in issue is the sufficiency of the evidence.

In *Holland* v. *United States*, *supra*, this Court upheld a conviction in a tax prosecution based solely on proof of net worth and expenditures. In doing so the Court emphasized that "an essential condition in cases of this type is the establishment, with reasonable certainty, of an opening net worth, to serve as a starting point from which to calculate future increases in the taxpayer's assets" (348 U.S. at 132). This admonition was directed to both juries and judges: the trial court, viewing the evidence in the light most favorable to the government, must determine whether reasonable men could find beyond a reasonable doubt that opening net worth was established with reasonable certainty; the jury must make the final determination of whether the opening net worth was so established. See 348 U.S. at 129, 140; Pet. App. 21-22. The court below reviewed the trial judge's charge to the jury and correctly concluded that "he followed the principles of *Holland* with both care and understanding" (Pet. App. 22). Petitioner's argument here is in essence simply that the case should not have gone to the jury because reasonable men could not have found, beyond a reasonable doubt, that the government had established the amount of his cash on hand on December 31, 1962, with reasonable certainty, and that

therefore the standard established by *Holland* was not met. But the evidence summarized above constituted an adequate basis for the jury's inference that the government's estimate of petitioner's opening cash on hand was accurate.[3]

Petitioner claims that the decision below represents a more lenient standard of sufficiency of proof than has been imposed by the Fifth Circuit in *Bryan* v. *United States*, 175 F. 2d 223, and *Dupree* v. *United States*, 218 F. 2d 781. But those cases merely turn on their own facts, as does the present case. They do not establish any conflict over the legal standard of proof or the scope of review to be applied in net worth cases. In *Bryan* the court relied heavily on the fact that there was no basis in financial statements, in records of the defendant, or in his admissions before trial, for the government's figures (175 F. 2d at 225), whereas here there was ample documentary support for all asset values except that of cash on hand, and petitioner himself had pegged the latter at $1,000 in his discussions with investigating agents. Similarly, in *Dupree* the government had not even purported to establish the opening net worth or

---

[3] Although petitioner now suggests (Pet. 3, 5-6, 13) that his claim of a $70,000 cash hoard was corroborated by a showing of substantial cash expenditures during the prosecution years and of a $17,000 cash hoard after the close of those years, those facts do not explain the source, or establish the existence, of an *earlier* store of cash. On the contrary, without any other reason to suspect that petitioner did have a pre-1963 cash hoard, these items tend to corroborate the substantial underreporting of income in the years 1963-1965 charged in the indictment.

available funds (218 F. 2d at 785); the proof offered there fell far short of that made here.[3] It is hardly surprising that, in reviewing the sufficiency of the evidence, courts of appeals applying the same standards of review reach different results in different cases.

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

OCTOBER 1972.

[3] See also *United States* v. *Fenwick*, 177 F. 2d 488, 491 (C.A. 7) (counsel for the government admitted at trial that the proof of net worth was inadequate).

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1972

No. 72-324

RUSSELL L. CARTER,

Petitioner,

vs.

UNITED STATES.

PETITION FOR REHEARING OF DENIAL OF WRIT OF CERTIORARI

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In The

SUPREME COURT OF THE UNITED STATES

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RUSSELL L. CARTER,

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PETITION FOR REHEARING OF DENIAL OF WRIT OF CERTIORARI

I. GROUNDS FOR A REHEARING

This matter should be reconsidered by this Court, because of intervening circumstances of substantial and controlling effect and to substantial grounds available to the Petitioner although not previously presented. The intervening circumstances arise from the publication in the October 18, 1972 issue of the Criminal Law Reporter (12 Cr.L. 4036, et. seq.) of the arguments before this Court in *Schneckloth* v. *Bustamote,* 448 F.2d 699 (CA 9, 1971). Counsel for the petitioner did not see this case nor know of its existence prior to reading the Criminal Law Reporter

at the end of the month of October. The petition in this case for the writ of certiorari was filed with this Court in August, 1972 almost two months before *Schneckloth*, the grant of certiorari therein and its argument came to the attention of counsel for the petitioner. *Schneckloth* has an issue in it which is identical or similar to an issue raised in the subject case, that is, knowing waiver of Fourth Amendment rights.

In *Schneckloth*, the first question on which certiorari was granted is as follows (10 Cr.L. 4193):

> "Must a verbal expression of consent in response to a polite police request to search an automobile to be substantiated by a demonstration that the consent was given with knowledge that it could be withheld?"

The Criminal Law Reporter's description of the oral argument in *Schneckloth* shows that the question of whether Miranda-like warnings for Fourth Amendment rights are necessary was discussed. The statement of issues in the brief submitted to the Sixth Circuit by the petitioner Carter herein stated the following:

> "2. Did the trial court commit error in failing to to suppress evidence which was obtained from the defendant without his being given advance warning of his Fourth Amendment rights?" (see page V of Brief of Appellant filed in the Sixth Circuit).

Prior to discovering this Court's interest in *Schneckloth*, counsel for petitioner thought this issue was dead. The decision of the Ninth Circuit in *Schneckloth* and the decision of the Sixth Circuit in this case are in conflict. The grant of certiorari in *Schneckloth* and the treatment accorded it before the Supreme Court, of which counsel for petitioner had no knowledge prior to October, 1972, requires this court to allow in this case.

II. ARGUMENT

During the course of the investigation and interviews of Carter there were no warnings of any Fourth Amendment rights accorded Carter by the I.R.S. agents. A Motion to Suppress all evidence and statements obtained from Carter was filed, based upon this failure. The trial court denied the Motion to Suppress. This was error.

A. The protection of the Fourth Amendment against wrongful searches and seizures applies to investigations by I.R.S. agents, whether performed by revenue agents or special agents.

Arguably, everything that was done by the Internal Revenue Service in Carter's case from a point during the first interview on July 27, 1966 was part of an investigation to establish his guilt. The memorandum of interview for July 27, 1966 by Revenue Agent Richards states in the first paragraph (Exhibit D):

> "Based on what taxpayer reported on his 1963, 1964 and 1965 Tax Returns, plus what income was reflected per the Ledger Book, it appeared that the taxpayer may have understated his income."

This occurred in the memorandum at the very inception of the first day's examination. Thus, there was a focusing "on a particular suspect," under the concepts of *Escobedo* v. *Ill.*, 37 U. S. 478 (1964). This meant the case had moved from a civil liability examination to a criminal proceeding. Certainly, it moved into a criminal proceeding when the special agent became involved in the investigation on September 22, 1966. As a result, the Fourth Amendment protection would apply. Of course, the Fourth Amendment applied to Carter from the minute that Revenue Agent Richards walked into Carter's office. The Fourth

Amendment applies to "administrative searches" as well. This was established in *Camara* v. *Mun. Ct.*, 387 U. S. 523, and *See* v. *Seattle*, 387 U. S. 541, which applied the search and seizure concepts to investigations by administrative agencies, even though they were not involved in criminal investigations.

B. The protection of the Fourth Amendment applies not only to the records but statements and oral information elicited from the accused as well.

The Fourth Amendment is not confined to physical objects and papers. It also applies to statements elicited from an individual. In *Wong Sun* v. *U. S.*, 371 U. S. 471, (1963), statements obtained from an individual while he was wrongfully arrested were suppressed. Statements which had been obtained as a result of wrongful eavesdropping, electronic or otherwise, will be suppressed, *Silverman* v. *U. S.*, 365 U. S. 505, (1961).

C. Before an Internal Revenue Service agent can examine records of a private citizen and obtain statements from him, which are then subsequently to be used by the United States in a criminal proceeding, the private citizen must be advised of his rights under the Fourth Amendment and then after such advice an intelligent waiver thereof must be obtained by the agent.

When significant constitutional rights are involved, the law requires that there be an intelligent waiver thereof. Intelligent waiver means that the individual must be warned and advised what his rights are, and then he must manifest in some overt manner a waiver of these rights. The law does not require the individual to assert those rights, without first being advised of those rights. In *Carnley* v. *Cochran*, 369 U. S. 506, 516, the Supreme Court dealt

with the requisites of a waiver of the right to counsel. The record was silent. Said the court:

> "Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation in evidence which shows, that an accused was offered counsel but intelligently and understandably rejected the offer. *Anything less is not waiver.*" (Emphasis added)

Thus, mere silence by the accused and a failure on his part to assert his right to an attorney is insufficient for waiving of a right to counsel. On a plea of guilty, an accused may not plead "without an affirmative showing that (his plea) was intelligent and voluntary. *Boykin* v. *Ala.*, 395 U. S. 238, (1969). There the Supreme Court quoted the above language from *Carnley* v. *Cochran, supra,* and stated that "the same standard must be applied to determining whether a guilty plea is voluntarily made." Again, the individual must be advised of his rights, before he can intelligently waive those rights in a guilty plea.

The 1966 amendment to Rule 11 of the Federal Rules of Criminal Procedure required that the judge should not accept a plea without "first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea." The Supreme Court held that failure of the trial judge to comply with that requisite means the plea is invalid, *McCarthy* v. *U. S.*, 394 U.S. 459, (1969). In explaining why strict adherence to that rule of personal interrogation by the trial judge must be enforced, Chief Justice Warren stated the purpose of this rule:

> "A defendant who enters such a plea simultaneously waives several constitutional rights, including his privilege against compulsory self-incrimination, his

> right to a trial by jury, and his right to confront his accusers. For this waiver to be valid under the Due Process Clause, it must be 'an intentional relinquishment or abandonment of a known right or privilege.' *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938) Consequently, if a defendant's guilty plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void."

Thus the federal courts have long recognized that in order for there to be a waiver of significant constitutional rights, it is necessary that the waiver must be "an *intentional* relinquishment or abandonment of a *known* right . . ."

In order to assure that the individual intentionally relinquishes a known right, he must be warned of these rights. When a court record is silent on warning, then relinquishment or waiver does not stand. The requirement that there can only be a waiver of an individual's rights after he has been warned is not confined to the court room. When these constitutional rights apply outside of the court room, the law also requires that there must be a warning, before there can be an intelligent relinquishment. The classic illustration of this is *Miranda* v. *U. S.*, 384 U.S. 436, (1966). There, the Court held that the privilege against self-incrimination applied to interrogation outside of a court room. As an ancillary right, to effectuate the privilege against self-incrimination, the Supreme Court also held that the right to counsel would also apply during the course of interrogations. The Court then held that in order for there to be a valid interrogation, the accused must be warned at the very inception of the interrogation of both rights and then there must be some overt manifestation of a waiver. In the absence of these warnings, the statements are inadmissible. As regards the waiver of right to counsel in the field, the Supreme Court stated in *Miranda* (384 U.S. at ——):

"No effective waiver of the right to counsel during interrogation can be recognized unless specifically made after the warnings we here delineate have been given. The accused who does not know his rights and therefore does not make a request may be the person who most needs counsel. * * * In *Carnley* v. *Cochran*, 396 U.S. 506, 513, 82 S.Ct. 884, 8 L.Ed.2d 70 (1962), we stated: '(I)t is settled that where the assistance of counsel is a constitutional requisite, the right to be furnished counsel does not depend on a request.' This proposition applies with equal force in the context of providing counsel to protect an accused's Fifth Amendment privilege in the face of interrogation. Although the role of counsel at trial differs from the role during interrogation, the differences are not relevant to the question whether a request is a prerequisite.
Accordingly we hold that an individual held for interrogation must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation under the system for protecting the privilege we delineate today. As with the warnings of the right to remain silent and that anything stated can be used in evidence against him, this warning is an absolute prerequisite to interrogation. *No amount of circumstantial evidence that the person may have been aware of this right will suffice to stand in its stead. Only through such a warning is there ascertainable assurance that the accused was aware of this right.*" (Emphasis added)

Thus the Court applied the same requisites for a valid waiver of right to counsel in the field as in a court room, *i.e.*, a statement to the accused of what the rights are, he need not expressly request the right, and then he must waive on an intelligent basis. This is so because the Supreme Court expressly cited *Carnley* v. *Cochran* in the above quote.

There is a division of authority as to whether *Miranda* is applicable, on the privilege against self-incrimination,

during I.R.S. interrogations in the field. Some courts have held, as to the privilege against self-incrimination, that there must be the *Miranda* warnings in the field just as well, at least when the special agent appears. See *U. S.* v. *Dickerson,* 413 F.2d 1111 (CA 7 1969); *U. S.* v. *Turzynski,* 268 F. Supp. 847 (N.D. Ill., 1967); *Goodman* v. *U. S.,* 285 F. Supp. 245 (Cal., 1968); *U. S.* v. *Wainwright,* 284 F. Supp. 129, (Colo. 1968). On the other hand, there is ample authority which indicates that the *Miranda* requisites for privilege against self-incrimination purposes, do not apply. But that split of authority does not apply to our argument. The cases which have held *Miranda* not applicable has so ruled on the basis that they can find no *custodial* interrogations involved. This is logical in that the privilege against self-incrimination requires some form of compulsion before it can be invoked ("nor shall be *compelled* in any criminal case to be a witness against himself . . .") The Fourth Amendment does not require any element of compulsion to be involved. The Fourth Amendment is a curtain which surrounds an individual, his home, his office and his records constantly. All that is necessary for the Fourth Amendment to be involved is for the government to intrude upon the man's privacy. Compulsion is irrelevant. In *U. S.* v. *Katz,* 389 U.S. 347, a tap on a public pay phone, which allowed the government to eavesdrop on conversation, was held an invasion of Fourth Amendment rights. There was no aspect of compulsion at all involved.

But *Miranda* is of assistance in determining the requisites for an individual's waiver of constitutional rights outside of a court room. When those rights apply, *Miranda* and all of the above authority establish that those rights cannot be waived without a warning. Warning is necessary to assure an intelligent relinquishment or abandonment of rights. If that is true of the privilege against self-in-

crimination and the right to counsel, it must necessarily apply to the protections accorded by the Fourth Amendment. The right to counsel and the privilege against self-incrimination may be as important as Fourth Amendment rights, but they are certainly no more important. If anything, the Fourth Amendment rights probably have a higher value in our constitutional hierarchy than the privilege against self-incrimination and right to counsel. The history of the Supreme Court has been gradually to include the provisions of the Bill of Rights in the Fourteenth Amendment's Due Process Clause. In determining which one of the Bill of Rights limits state government, the Court included only those rights which are fundamental to our concepts of ordered liberty. The Fourth Amendment was given recognition long before the privilege against self-incrimination. Thus in *Wolf* v. *Colo.*, 338 U.S. 25 (1949), the Supreme Court recognized the Fourth Amendment as being a limitation upon state government, although it did not apply the exclusionary rule at that time. Finally in *Mapp* v. *Ohio,* 367 U.S. 643, (1961), the federal exclusionary rule was also applied to the states. Thus by 1961, the Fourth Amendment was applied in an undiluted manner as a limitation against state action. The right to counsel was not held applicable in an undiluted manner to state court proceedings until 1963 in *Gideon* v. *Wainwright,* 372 U.S. 335 (1963). The privilege against self-incrimination was not included as being protected against state action until 1964 in *Malloy* v. *Hogan,* 378 U.S. 1. Thus the prior recognition of the Fourth Amendment as fundamental to the "concepts of ordered liberty" means that it is no less important than the later recognized privilege against self-incrimination and right to counsel. If the latter two cannot be waived in the absence of a warning, it necessarily follows that the Fourth Amendment cannot be waived in the absence of warnings either.

There is ample authority supporting our argument that the *Miranda* requisites of express warnings before there can be a valid waiver apply to Fourth Amendment rights.

In *U. S.* v. *Blalock,* 255 F.Supp. 268 (D.C. Pa. 1966), the defendant was met by FBI Agents and then frisked. They then went to his room, and the party entered. After some questioning of defendant, he was asked if he minded if the FBI men searched his room. He stated there was no objection. Incriminating evidence was found. On a motion to suppress, Judge Lord granted the motion to suppress. He found that there must be an "intentional relinquishment or abandonment of a known right" before there is an effective waiver, citing *Johnson* v. *Zerbst,* 304 U.S. 458, *supra.* He then wrote (255 F.Supp. 269-70):

> "First, the consent must have been 'intelligent.' Obviously, the requirement of an 'intelligent' consent implies that the subject of the search must have been aware of his rights, for an intelligent consent can only embrace the waiver of a 'known right.' *Johnson* v. *Zerbst,* 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938); *United States ex rel. Mancini* v. *Rundle,* 337 F.2d 268 (CA 3, 1964). Certainly, one cannot intelligently surrender that which he does not know he has. Cf. *United States ex rel. Mancini* v. *Rundle,* supra; *Walker* v. *Pepersack,* 316 F.2d 119 (CA 4, 1963). The agents here properly warned defendant of his right to counsel and his right to remain silent, but they did not warn him of his right to refuse a warrantless search. The Fourth Amendment requires no less knowing a waiver than do the Fifth and Sixth. The requirement of knowledge in each serves the same purpose, i.e., to prevent the possibility that the ignorant may surrender their rights more readily than the shrewd. Conceivably, the assent of the defendant may have been 'the false bravado of the small-time criminal.' *Judd, supra.* 190 F.2d at 651; or it may have been an untutored submission to authority.

> Which it was could have been resolved by the officers at the scene. To require law enforcement agents to advise the subjects of investigation of their right to insist on a search warrant would impose no great burden, nor would it unduly or unnecessarily impede criminal investigation. Here, the evidence shows no such warning, nor is there any other evidence that Blalock was aware of his Fourth Amendment right. It cannot be said, then, that the Government has sustained its burden of showing that there was an intelligent waiver of a known right."

In *U. S.* v. *Nikrasch,* 367 F.2d 740 (CA 7 1966), after the defendant was arrested, he "permitted" the law enforcement men to examine his car. Defendant filed a motion to suppress the evidence obtained as a result of the search of the vehicle. The Seventh Circuit found there could be no consent to search (367 F.2d at 744):

> "Since the arrested defendant was then in custody in the Skokie cell-block and had not been apprised of his Fourth Amendment rights, the trial court correctly observed that no true consent had been given to Detective Reiter. *Johnson* v. *Zerbst,* 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461; *Judd* v. *United States,* 89 U.S. App.D.C. 64, 190 F.2d 649, 651 (1951); *United States* v. *Blalock,* 255 F.Supp. 268 (E.D.Pa., 1966)."

In *U. S.* v. *Moderacki,* 280 F.Supp. 683 (D.C. Del. 1968), the defendant, as postal employee, was taken to a postal inspector's office and given *Miranda* warnings. He expressly waived. He was then asked if he would mind emptying his pockets, which he proceeded to do. He was given no warning as regards the effect of what could be obtained from his pockets. On a motion to suppress the evidence that was obtained from his pockets, the District Court held that in the absence of a warning that he need not submit

to a search, and that anything found could be used against him, there could be no knowing waiver by the defendant. Said the district court, 280 F.Supp. at 636:

> "The key to a voluntary waiver is whether it was done knowingly. An inference that a person has been warned is not one and the same thing as an actual warning. The rule of waiver is not intended so much for the protection of the cool, hardened, criminal as for the slow-witted offender and perhaps on occasion, the innocent person caught in a web of circumstances who becomes frightened or confused. The former, but not necessarily the latter, might suspect that the Miranda-type warning is equally applicable to a search. It is obviously repetitive, and may even seem slightly ridiculous, for an officer, having once given the Miranda warning before taking a suspect's statement, to have to repeat relatively the same warning before searching his person. But only in this fashion can it be known beyond doubt that the suspect, in emptying his pockets, has done so with a full knowledge of what he is doing. Lacking an explicit warning as to his rights under the Fourth Amendment, it can never be known with certainly whether a defendant voluntarily waived those rights. Accordingly, the search was unlawful insofar as it rests upon the defendant's waiver of his rights." Also see *Perkins* v. *Henderson,* 418 F.2d 441 (CA 5 1969).

Two cases have supplemented the Fourth Amendment right with the right to counsel, as *Miranda* did with the privilege against self-incrimination.

In *U. S.* v. *Fisher,* 9 Cr.L. 2405 (U.S.D.C. Minn. 7/22/71), the defendant was arrested. He was given his Miranda warnings and then was arraigned before a United States Commissioner. Later, he signed a consent to search form. The district court granted a motion to suppress and held that the form was inadequate. Said the District Court (9 Cr.L. 2406):

"The argument of course is present that Miranda was a Fifth Amendment case and did not countenance a Fourth Amendment search and seizure claim. This court believes a defendant's Fourth Amendment rights are encompassed by Miranda. No one here orally advised defendant, so far as the testimony discloses, of his right not to consent to a search, though Exhibit 3 contains language to this effect, nor the consequences thereof. Certainly this is a vital or critical step in his case, and having asked for counsel he was entitled to advice of counsel as to the consequences of what he was doing and as to what would be required to obtain a search warrant. The only direct authority that has come to the court's attention — and with which this court agrees — is *United States* v. *Pelensky*, 300 F.Supp. 976 (D.Vt. 1966). * * * *Pelensky* was a case where no Miranda warnings were in fact given. The result this court reaches would follow as an a fortiori where warnings were given yet defendant refused to talk and requested counsel.

Noteworthy also is the fact that in the case at bar there was no immediacy to the situation. Defendant was incarcerated and had not yet made bail; the Commissioner, who can authorize a search warrant, was present and yet no application was made therefor. This was not a search incident to arrest nor under any exigency. If in fact the Secret Service Agents had probable cause to believe that the items they ultimately found were in defendant's house, there would have been no problem in securing a search warrant and proceeding accordingly.

Accordingly the court grants defendant's motion to suppress the items seized at defendant's residence and any 'fruits' thereof and of course any oral testimony concerning the same."

In *U. S.* v. *Pelensky*, 300 F.Supp 976 (D.C. Ver. 1969), the defendant was an occupant of a vehicle which was ordered to the side of the road. He was asked for the

gun in his possession, which he turned over to the law enforcement men. The district court suppressed the evidence, but on the basis that the defendant should have been told of his right to counsel. Said the district court (300 F.Supp. at 978-9):

> "The right to counsel, and the *Miranda* warning informing the accused of his right, while imposed to protect fifth amendment rights in *Miranda*, is more pervasive. It is not linked solely to the protection of fifth amendment rights but applies in every 'critical' stage of the proceedings. *United States* v. *Wade*, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967). Certainly a request to produce evidence that is central to the prosecution's case is a critical stage of the proceedings against the accused. The presence of counsel is an effective check on the unknowing relinquishment of fourth amendment rights just as it is an effective check on the unknowing waiver of fifth amendment rights. Therefore, production of evidence by an accused without the assistance of counsel or without waiver of counsel where, as in *Miranda*, the defendant is under arrest, cannot be considered a knowing and intelligent act.
>
> Accordingly, because of the failure of the arresting officers in this case to inform the defendant of his right to counsel prior to requesting the revolver and the absence of any mitigating circumstances, the motion to suppress must be granted."

Admittedly, these cases involved situations where the accused was incarcerated and the custodial requisites of *Miranda* were met. But as we have shown above, there is no prerequisite of compulsion for Fourth Amendment rights to be involved. The Fifth Amendment requires compulsion, which inheres in custody situations. Because the Fourth does not require compulsion, there need be no custody for it to be applicable.

In addition, traditionally the courts have recognized that one can have a "consent search." The trouble with that line of authority is that those cases have not considered the implications of the authority requiring a warning of rights before there can be an intelligent waiver. The clear implication of the cases cited above, dealing with right to counsel, privilege against self-incrimination, right of confrontation, right to a jury trial, and search and seizure, is that there can be no waiver in the absence of a warning.

D. As applied to our case.

As we argued to the trial court in our Motion to Suppress, there was no warning given at any time to Carter by I.R.S. on his Fourth Amendment rights. No statements were made by them in relation to his right to require a search warrant, or at the least a summons. The fact that he did not assert his Fourth Amendment rights is irrelevant under the above line of authority. The obligation is on the government to warn him of those rights and to obtain from him an express waiver after such warning. Because these warnings were not accorded Carter, the trial court should have suppressed all of the records and statements obtained from Carter. Reversible error was committed.

III. CONCLUSION

The Sixth Circuit in this case rendered a decision which is in conflict with that of *Schneckloth* in the Ninth Circuit. This represents an important question of federal law which should be settled by this court. The Sixth Circuit decided this case in a way which is in conflict with the applicable decisions of this Court. Because of the grant of *certiorari* in *Schneckloth*, along with its oral argument of Miranda-

like warnings on Fourth Amendment rights, *Schneckloth* is identical to our case. Based on all of the above, this Court should grant this petition for a rehearing and grant the Petition for Writ of Certiorari.

Respectfully submitted,

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By .....

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CERTIFICATE OF COUNSEL

This Petition for Rehearing is presented in good faith and not for delay, and is exclusively attributable to the grant of *certiorari* in *Schneckloth*, its argument before this Honorable Court on October 10, 1972, with a synopsis of that argument being printed in the Criminal Law Reporter of October 18, 1972. Counsel for petitioner had no knowledge of the above until late October, 1972. The Petition is restricted to the grounds specified in this Petition for a Rehearing.

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